

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





ORIGINAL  
WITH PROOF  
OF SERVICE

77-6078

77-6081

77-6083

UNITED STATES COURT OF APPEALS

for the

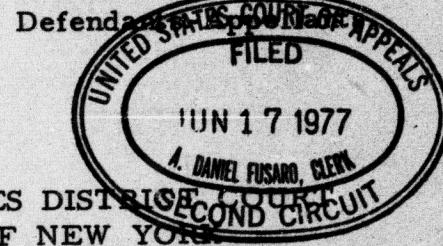
SECOND CIRCUIT

PLEASE RETURN TO  
RECORDS ROOM

F. RAY MARSHALL, Secretary of Labor of the United States,  
Plaintiff-Appellee,

-against-

GEORGE SNYDER, IRVING ROSENZWEIG, GENERAL TEAMSTERS  
INDUSTRIAL EMPLOYEES LOCAL 806, 806 RECORD PROCESSORS,  
INC., ANTHONY CALAGNA, CLARENCE CLARKE, JOSEPH  
GRIPPO, JAMES ISOLA, BENJAMIN PETCOVE AND WILLIAM  
SNYDER,



ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLANTS GENERAL TEAMSTERS INDUSTRIAL  
EMPLOYEES LOCAL 806 AND 806 RECORD PROCESSORS, INC.

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Docket Nos. 77/6078  
77/6081  
77/6083

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F. RAY MARSHALL, Secretary of  
Labor of the United States,

Plaintiff-Appellee,

-against-

GEORGE SNYDER, IRVING ROSENZWEIG,  
GENERAL TEAMSTERS INDUSTRIAL  
EMPLOYEES LOCAL 806, 806 RECORD  
PROCESSORS, INC., ANTHONY CALAGNA,  
CLARENCE CLARKE, JOSEPH GRIPPO,  
JAMES ISOLA, BENJAMIN PETCOVE  
AND WILLIAM SNYDER,

Defendants-Appellants.

BRIEF OF APPELLANTS GENERAL TEAMSTERS  
INDUSTRIAL EMPLOYEES LOCAL 806 AND 806  
RECORD PROCESSORS, INC.

PRELIMINARY STATEMENT

Defendants-Appellants General Teamsters Industrial  
Employees Local 806 (hereinafter sometimes referred to as the  
"Union") and 806 Record Processors, Inc. ("RPI") submit this  
brief in support of their appeal from an order by the United



States District Court for the Eastern District of New York appointing a receiver. The order was initially entered on April 28, 1977 and was finalized on May 10, 1977.

ISSUES PRESENTED FOR REVIEW

1. WHETHER THE COURT BELOW ERRED AS A MATTER OF LAW IN APPOINTING A RECEIVER IN THE ABSENCE OF STATUTORY AUTHORITY TO DO SO AND WHERE LESS DRASTIC REMEDIES WERE AVAILABLE?
2. WHETHER THE COURT BELOW ERRED IN APPOINTING A RECEIVER OVER 806 RECORD PROCESSORS, INC., A PARTY IN INTEREST, IN THE ABSENCE OF STATUTORY AUTHORITY TO DO SO AND WHERE NO ALLEGATIONS OF WRONGDOING WERE MADE AGAINST SAID PARTY IN INTEREST?
3. WHETHER THE COURT BELOW LACKED JURISDICTION TO APPOINT A RECEIVER IN THE ABSENCE OF AN INDISPENSIBLE PARTY?
4. WHETHER THE FACTS RELIED ON BY THE COURT BELOW IN APPOINTING A RECEIVER WERE AGAINST THE WEIGHT OF THE EVIDENCE?

STATEMENT OF THE CASE

The Secretary Of Labor Of The United States has brought suit under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001, et seq., alleging that certain prohibited transactions have occurred with regard to two employee benefit plans. The suit seeks both injunctive and monetary relief against the



defendants, present and former trustees of these plans, and the defendant union and service corporation.

On February 4, 1977, the parties entered into a Consent Order which provided in part that no payments would be made by the plans to any defendants with the exception of salary payments in specified amounts to four named individuals. As part of the Consent Order, the plaintiff withdrew his Motion For A Preliminary Injunction which previously had been filed.

Thereafter, the plaintiff submitted an Order To Show Cause requesting that defendants be held in contempt and that a Receiver be appointed for the plans and for defendant-appellant 806 Record Processors, Inc. ("RPI") on the grounds that defendants had violated the Consent Order by making payments for work not actually performed and by frustrating discovery proceedings.

Pursuant to the Order To Show Cause, a hearing was held after which the District Judge, Hon. George C. Pratt, reserved decision on the question of contempt, but ordered that a Receiver be appointed for the plans and for RPI. The order was initially entered on April 28, 1977 and thereafter finalized on May 10, 1977. It is from this Order that this Appeal is taken.

On May 23, 1977 Appellants filed a Motion for an Expedited appeal and for a stay pending the determination of the appeal, but after the pre-argument conference, it was agreed by the parties to



expedite the appeal and to consolidate the argument on the motion until the date on which the merits of the appeal would be argued.\*

#### STATEMENT OF FACTS

Plaintiff's complaint alleges violations of ERISA as a result of three specific transactions, which are distinct from the transactions alleged by plaintiff in its motion for an injunction and for the appointment of a receiver, which gave rise to the orders which are the subject of the instant appeal. The transactions alleged in the complaint are improper payments to George Snyder, a transfer of \$290,000 from R.P.I.\*\*to the Union and payments for the construction and decorating of the new offices of the Union and the Funds.

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\* Other defendants below are also appealing from the instant orders. These appeals have been designated as Docket Numbers, 77-6081 and 77-6083. Defendant-Appellants General Teamsters Industrial Employees Local 806 and 806 Record Processors, Inc., specifically incorporate and adopt the statement of facts and the arguments raised in these consolidated briefs insofar as such issues are relevant to the instant appellants.

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\*\* RPI, a New York Corporation, whose assets are wholly-owned by the welfare plan, provides administrative and other services for both of the union's active benefit plans. The employees of RPI service both the pension plan and the welfare plan which permits a more efficient utilization of resources by avoiding duplication of effort.



On January 25, 1977, plaintiff moved for the appointment of a receiver and for a preliminary injunction.

On February 4, 1977, plaintiff's motion was withdrawn and the parties entered into the Consent Order, approved by the District Court, which provided, in pertinent part, as follows:

"1) that defendant trustees of the Local 806 Welfare Fund, Pension Fund, and Annuity Fund shall not make or permit to be made any direct or indirect payments for any purpose from the assets of the respective Funds of which they are trustees to defendant George Snyder, to any of the other individual defendants, to defendant Local 806, or for the benefit of any of said defendants;

"2) that defendant 806 Record Processors, Inc. shall not hereafter make or permit to be made any direct or indirect payments for any purpose from its assets to defendant George Snyder, to any of the other individual defendants; to defendant Local 806, or for the benefit of any of said defendants; with the only exception that 806 Record Processors, Inc. may continue



to make salary payments for services actually rendered to defendants Clarence Clarke, Anthony Calagna, James Isola, and William Snyder in amounts not exceeding the following:

|                 | <u>Maximum per week</u> |
|-----------------|-------------------------|
| Anthony Calagna | \$ 750                  |
| Clarence Clarke | \$ 300                  |
| James Isola     | \$ 825                  |
| William Snyder  | \$ 600                  |

"3) that defendant trustees of the Welfare Fund, Pension Fund, and Annuity Fund shall make all books and records of the respective Funds and of 806 Record Processors, Inc. available for inspection and copying to the attorneys for the plaintiff or their agents, during normal business hours upon one (1) day's prior notice."

By Order to Show Cause dated April 8, 1977, plaintiff moved for an order (1) appointing a receiver over the Funds and R.P.I.; (2) enjoining R.P.I. and the Funds from making payments to Calagna, Clarke, Isola, and William Snyder; (3) holding certain defendants in contempt of the Consent Order; and (4) directing that defendants comply with subsequent discovery requests made by Plaintiff.



The basis claimed by plaintiff for the relief requested in its motion was that the Consent Order was being violated in that:

1. Payments were being made to defendants Isola, Calagna, Clarke, and Willian Snyder for "work performed for the union, or for no work, but in any event not for any substantial work properly performed for (R.P.I.);"
2. Certain payments were made to two of the above-named defendants which were in excess of the amounts provided in the Consent Order; and
3. Certain defendants had failed to comply with plaintiff's discovery requests.

An evidentiary hearing with respect to plaintiff's motion was held on April 21, 1977. After said hearing, the Honorable George C. Pratt, United States District Judge for the



Eastern District of New York, filed a 28-page Memorandum and Order on April 28, 1977 which granted plaintiff's motion to the extent that all defendants were enjoined pendente lite from making or permitting to be made any payments from R.P.I. and the funds to Calagna, Isola, Clarke or Willian Snyder and Edgar G. Brisach, Esq., was appointed as a receiver for the Funds and R.P.I.

On May 10, 1977, a final order in amplification of the Memorandum and Order of April 28, 1977 was signed by the District Court.



POINT I

THE COURT BELOW ERRED AS A  
MATTER OF LAW IN APPOINTING  
A RECEIVER

Appellants bring before this Court a novel question never before presented to a Circuit Court involving the interpretation of a recently enacted regulatory statute. As with other statutes, this Court must examine the purposes of the Act, its legislature history and the manner in which the Act fits into the overall legislation in the area in addition to the plain meaning of the statute. Furthermore, the precise factual situation, which gave rise to the orders from which this appeal is taken, must be evaluated and considered in light of the more general factors mentioned above. Appellants submit that a review of these various elements leads to the conclusion that the appointment of a receiver was totally erroneous and inappropriate and that the orders of the District Court must be reversed.



This conclusion is premised on two arguments; first that a receivership is not available as a remedy under ERISA and, secondly, that if the remedy is available, it was an abuse of discretion to impose it under the facts of the instant case.

A. The Factual Setting

The District Court made several findings of fact which are relevant to the instant discussion. Appellant Union represents approximately 2,160 members. The Welfare Plan provides benefits to approximately 10,000 potential beneficiaries including about 2000 union members. The Pension Plan covers about 1000 members. A third plan, the Annuity Plan, is a plan organized to defer the accrual of income earned by Union members. Appellant George Snyder is a trustee of the Welfare Plan and the Annuity Plan and secretary-treasurer of the Union. Appellant Irving Rosenzweig, the second trustee of the Welfare Plan is an officer of an employer under contract with a Union shop. The two trustees of the Pension Plan are Appellants Clarence Clark, an employee of RPI, and Joseph Grippo, an officer of another employer of Union members. (Memorandum and Order, April 28, 1977. A 298-300)



In addition, there was testimony at the evidentiary hearing that 40% of the membership of the Union is Spanish speaking and that the language problem creates special problems in the administration of the plans. (A 230, A 264).

A more detailed discussion of the work of RPI and its field representatives is contained in the brief of Appellants Calagna, et al, Dkt. # 77-6081, which is specifically adopted and incorporated by reference herein.

The complaint in this case focuses on three primary areas of concern: (1) excessive compensation previously paid to George Snyder, (2) a past loan transaction, and (3) the use of plan assets to refurbish offices jointly occupied by the Union and the plans. However none of these problems was directly before the District Court in determining plaintiff's motion for the receiver since none involved any alleged on-going dissipation of the plans' assets since the entry of the Consent Order.

The precise question before the District Court was whether the Consent Order had been violated by excessive payments to certain individuals subsequent to the time the Consent Order was entered. The question of excessiveness was two-fold: (1) Whether



the specified employees were in fact performing services for the plans, and (2) whether they had been paid in excess of the amounts designated in the Consent Order.\* It is important to reiterate that the District Court's sole area of concern on a motion for preliminary relief should have been how to deal with any on-going dissipation subsequent to the Consent Order.

B. The District Court's Order

The Court below found that the payments made to the individuals designated in the Consent Order violated that Order. While appellants strenuously oppose these findings (See Calagna brief), for purposes of this argument it suffices to say that the excess payments, involving two individuals' accrued vacation pay, were de minimus. The other named employees were paid salaries, which even when added to their expense allowances, did not exceed the maximum payments specified in the Order. (A 290)

\*While plaintiff alleged a further violation of the Consent Order in that their discovery was being impeded, the District Court's Memorandum did not discuss this allegation in detail. Appellants examine this issue in Point, II, infra.



The Court also found that the employees of RPI were providing benefits to the Union and that such benefits violated the terms of the Consent Order.

However, the Court reserved decision on plaintiff's request that the defendants be found in contempt since it was possible that defendants "believed in good faith" that the purpose or effect of the Consent Order was to maintain the status quo. (Mem. and Order, A 317)

As a result of its findings the Court appointed a receiver over the plans and over RPI. The receiver was given the "sole authority to control and manage the operation and administration of the plans and of RPI," and was given sweeping powers including:

a) the power to modify wholly or partially change the terms and conditions of employment of current employees, consultants, service providers, or other personnel associated with the plans or with R.P.I.; or to terminate such employment, consultation, provision of services, or association;

b) the power to hire and set the terms and conditions of employment of new employees; to retain counsel except with respect



to the claims asserted in the instant litigation; and, as he deems necessary for the proper administration of the plan, to retain other professionals such as accountants, administrators or actuaries or other persons with expertise in the field of employee benefit plans;

c) the power to terminate, renegotiate or otherwise change as permitted by law, any and all contracts or agreements for property, goods, or services, to which any of the plans or R.P.I. is a party.

d) the power to make expenditures from the plans or R.P.I. assets for all goods and services or other expenses and costs reasonably incurred and necessary to the administration of the plans and of R.P.I.;

e) the power to institute, prosecute and defend, compromise, adjust, intervene in or become party to such actions or proceedings as may in his opinion be necessary or proper for the protection, maintenance, collection and preservation of the assets of the plans and R.P.I. or the carrying out of the terms of this Order, and likewise to defend, compromise or adjust or otherwise dispose of any or all actions or proceedings instituted against



the plans or R.P.I. and also to appear in and conduct the defense of any suit or adjust or compromise any actions or proceedings now pending in any court by or against said entities where such prosecution, defense or other disposition of such actions or proceedings will in the judgment of said receiver be advisable or proper for the protection of the property or assets of any of the entities or when such action is in the best interests of plan participants or their beneficiaries; however, the receiver shall have no power or duty to pursue any claims already at issue in this action; and

f) the power to cease all payments to R.P.I. or with the approval of this Court to dissolve the corporation if he determines that the services of said corporation are not necessary to the proper administration of the plans and to reimburse to the plans all sums remaining in R.P.I. accounts.

C. The Court's Reasoning

The primary focus of Judge Pratt's memorandum was that there existed an "inherent conflict of interest" and "potential for self-dealing" as a result of the presence of Union officers



as trustees of the plans and the close relationship between the activities of the Union and the plans. (Mem. and Order, A 313)\* The District Judge stated that ERISA "intended to separate the interests of the Union and its officers from those of the Plans, their participants and beneficiaries," (Mem. and Order, A 313) and that the only way to "obtain compliance with the purposes and requirements of ERISA" was to sever the relationship between the Union and the Plans. Recognizing that a receiver was a "drastic" remedy (Mem. and Order, A 313) the Court nonetheless appointed a receiver and gave him tremendously broad powers, including the right, with the prior approval of the court, to dissolve RPI.

In regard to the court's desire to sever the relationship between the Union and the plans, it should be noted that plaintiff's attorneys had stated that their desire was to cause the Union to become "dissociated" from the plans although they

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\*This same concern was manifested in the Court's Memorandum and Order of May 13, 1977 denying a stay pending appeal. (P. 2)



were not able to state what the relationship should be.

They recognized, however, that the proper relationship between the Union and the Plans was a "terribly complex situation". (A 275, 6)

D. The Statute

The Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001, et. seq. (ERISA) was designed to meet the growing impact of employee benefit plans on the national economy and to protect the interests of the participants of these plans. 29 U.S.C. 1001. The Secretary of Labor is authorized under the statute to:

- (a) enjoin any act or practice which violates any provision of this subchapter, or
- (b) obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter.

29 U.S.C. 1132 (a)(5).

While the statute permits "appropriate equitable relief", it is silent on the drastic remedy of receivership. However, a later subchapter of the statute in treating plan termination insurance, specifically provides for a receiver during the dissolution stages of a terminating plan. 29 U.S.C. 1304. The presence of



this specific language highlights the absence of a similar provision for an on-going plan.

E. The Legislature History

The legislature history of the statute is silent on the question of whether Congress intended to authorize a receivership for an on-going plan. Unlike the specific language in section 1304, there is no mention of receivership in an on-going plan by any of the sponsors or committees involved with this statute. While receivership is not mentioned, other specific remedies are discussed. These include removal of a fiduciary after repeated violations enjoining violative practices, requiring assets to be restored, and assessments of civil penalties. 3 U.S. Code Cong. & Admin. News 1974, pp. 4882-3, 5107. Nowhere is there an indication that Congress intended such drastic action with regard to an on-going plan.

F. Other Labor Statutes

In the face of the silence of the statute and its legislative history on the issue of receivership, a brief glance at the history of labor-related statutes supports the argument that the remedy of receivership should not be read into the



statute. This argument is based on the historical reluctance of the federal judiciary to become enmeshed in the struggles of labor. The initial anti-injunction provision of Norris-LaGuardia, 29 U.S.C. 101, while now subject to limitations was intended in part:

"to withdraw federal courts from a type of controversy for which many believed they were ill-suited and from participation in which, it was feared, judicial prestige might suffer."

Marine Cooks & Stewards v. Panama  
Steamship Co., 362, U.S. 365 (1960)

Cf. Cuff v. Gleason, 515 F. 2d 127 (2d Cir. 1975).

The problems with a receiver in an on-going plan can be seen in light of section 104 of Title 29 under which the federal courts cannot issue an injunction in any case (arising out of a labor dispute) to prohibit any person from receiving, for example, unemployment benefits or insurance, or other moneys or things of value. While the court cannot directly engage in such actions, can it do so through the mechanism of a Court-appointed receiver? The answer must clearly be that it cannot. Yet with a receiver administering an on-going plan, the federal courts will be doing indirectly, what they are prohibited from doing directly. In light of the



historical reluctance of the judiciary to enter such controversies, the statute should be read to exclude this drastic remedy.

G. Receivership Over RPI

In addition to the arguments set forth above, a special situation exists with regard to Appellant RPI. As already noted, RPI is a New York Corporation whose employees provide administrative services for the Welfare Plan and the Pension Plan. While RPI's stock is wholly owned by the trustees of the Welfare Plan, it is a viable corporation with assets, income and employees. It is for all purposes an independent person. N.Y.B.C.L. Sec. 202.

The only allegations in the lawsuit which speak to the need for an interim remedy regarding RPI are that the employees of RPI in servicing the plans, are also indirectly benefiting the Union. (The precise manner in which these alleged indirect benefits occur is explored in greater detail in the brief of Appellant Calagna, et al.) There are no allegations against RPI of fraud or substantial dissipation.



The statutory provisions as to remedies do not make any distinctions between remedies against a plan or against a party in interest. However, the category of "party in interest" is so broad that it at once becomes obvious that a receiver over a party in interest is beyond the scope of the statute. For example, included as "parties in interest" under the statute (29 U.S.C. 1002 (14) ) are employers whose employees are covered by the plan (1002 (14)(c) ), the union whose members are covered (1002 (14)(d) ), the majority stockholder of a corporation whose workers are covered by plans (1002 (14)(e) ), and even a relative of such stockholder (1002 (14)(f) ). It cannot be said that the statute authorizes a district court to appoint a receiver or impose any similar drastic relief against such person, especially in the absence of proof or even allegations of wrongdoing.

Whether this argument is couched in terms of statutory construction or abuse of discretion is not of paramount concern. What is clear, however, is that the appointment of a receiver over a party in interest cannot be sustained.



#### H. Abuse Of Discretion

Appellants contend as stated above that the imposition of a receivership over the plans and RPI is not an available remedy under ERISA. However, if the statute can be read to permit receiverships over on-going plans, the use of this remedy under the facts at bar must be found to be totally inappropriate.

The District Court was faced with a limited problem; how to balance the various concerns until a final adjudication was reached. To aid in this regard, the court already had a Consent Order which on its face prevented any continuing violations or dissipation of plan assets. While there was an allegation of a minor payment slightly in excess of the amount specified in the Court Order and a further allegation that benefits were still being received by the Union, there was a substantial question as to whether defendants believed they were entitled to operate in the manner alleged. In light of this confusion, the Court simply could have clarified the Consent Order to avoid any future violations; there was absolutely no need to go any further than clarifying the Consent Order.



The major portion of the District Court's reluctance to use a less drastic remedy apparently stemmed from confusion over the proper relationship between the Union and the Plans. As already noted, plaintiff was unable to offer any suggestions as to what that relationship should be, but sought to "dissociate" the Union and its officers from the operation of the plans. This same result was sought by the District Judge. However, this result is not authorized by the statute. To the contrary, the Act specifically permits union officers to act as trustees of the plan. 29 U.S.C. 1108 (c)(3).

The specific permission for union officers to serve as trustees must be viewed in light of section 501 of Title 29 which states that union officers occupy a fiduciary relationship with regard to the union and its members. Thus, by permitting union officers to serve as fiduciaries of employee benefit plans, the statute contemplated situations of dual fiduciary obligations. A plan trustee who is also a union officer, must, at the same time, act as a fiduciary towards both the plan and the union. Congress, therefore, created a situation which permits, if not requires, plans and their unions to work in concert.



None of the above analysis suggest for a moment that the respective fiduciary obligations should be abused. However, a forced disassociation of the Union from its plans is not either a requirement or even necessarily a desired goal under ERISA. While such dual fiduciary obligations might be impermissible under State Law, the preemption by ERISA in this area forecloses the use of State Law. 29 U.S.C. 1144(a).

Thus, the mere fact that there exists a close relationship between Union officers and plan trustees does not warrant the use of what the court itself called a "drastic" remedy. There is no reason to believe that a clarification of the Consent Order would not have been sufficient to obtain the compliance sought by plaintiff\*.

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\*As noted in Appellants Motion For Stay which is also presently before this Court, there is a serious question as to plaintiff's motives in requesting this relief after their voluntarily entering into the Consent Order. It was suggested by the District Judge in chambers that the unfavorable publicity resulting from the Consent Order may have motivated plaintiff to seek further relief. (affidavit of Herbert A. Simon, p. 4)



In any event, in light of the relatively minor nature of the allegations of on-going violations, the imposition of a receiver was unnecessary and inappropriate.

During the two years in which ERISA has been effective apparently no similar cases have been submitted to a District or Circuit Court.\* Other cases in which receivers have been sought, though, provide some guidance as to the use of this remedy. For example, in Leighton v. One William Street Fund, Inc. 343 F. 2d 565 (2d Cir. 1965), this Court upheld the District Court's refusal to impose a receivership over a stock fund. The appellant there was seeking a receiver due to claimed conflict of interest between the defendant brokers and the fund, and additionally, an alleged waste of the fund's assets. Thus, the allegations are on point with those at bar. This Court in refusing to appoint

\*O'Brien v. Cassidy, 76 C. 1076 (E.D.N.Y., 1976) cited by plaintiff in the instant case was a Consent Order regarding a terminating plan. It is, therefore, no authority for the Orders imposed below.



a receiver called such remedy "extraordinary" and in the absence of irreparable injury upheld the District Court's ruling. As in Leighton, "monetary damages would be an entirely adequate form of relief." And, in any event, "a plenary trial on the merits...is a much better alternative to the drastic relief requested." Leighton, supra. 343 F. 2d at 568.

In the case at bar, not only is monetary relief available in the event plaintiff succeeds at the trial, but limited injunctive relief could prevent any violations of the sort plaintiff complained of subsequent to the entry of the Consent Order. There was no need for the "extraordinary" remedy imposed below.

In this regard it is significant to note that plaintiff does not seek to put the plans permanently into receivership nor would such relief be appropriate either under the statute or under the instant facts. Since a receiver is inappropriate as a form of final relief, it must be seen that there exist less drastic alternatives to accomplish the goals plaintiff seeks in this litigation. There is no reason whatsoever to have a <sup>more</sup> drastic remedy applied at an interim stage, prior to proof of wrongdoing, than after trial on the merits. It is for this reason that the



Supreme Court in Gorden v. Washington, 295 U.S. 30, 38 (1935)

in reversing a lower Court appointment of a receiver stated that:

A federal court of equity should not  
appoint a Receiver where not ancillary  
to some form of final relief...appropriate  
for equity to give.

See Also, Gorden v. Ominsky, 294 U.S. 186 (1935); Pennsylvania v. Williams, 294 U.S. 176 (1935).

While this Court in Leighton, supra, did not limit the use of receivers with the same strictness as the language of Gorden v. Washington, the limited appropriateness of the remedy was clearly stated. Similarly in Chambers v. Bickle Ford Sales, Inc., 313 F. 2d 252 (2d Cir. 1963), this Court refused to permit a receivership stating:

one should not be appointed...  
under the usual rule that this  
is an extraordinary remedy to  
be resorted to only where some  
injury to property can be avoided  
in no other way

313 F. 2d at 260  
(Emphasis added)



As has been stated above, there were other available remedies in the instant case so that it could not be said that injury to the corpus could be avoided "in no other way". See also Mintzer v. Arthur L. Wright, Co. 263 F. 2d 823 (3rd Cir. 1959), cited in Chambers. In short, the appointment of a receiver should not be upheld "absent a showing that property... was in grave and imminent danger of dissipation." Zinke-Smith, Inc. v. Marlowe, 323 Fed. <sup>Supp.</sup> / 1151 (D.C.V.I. 1971). See also Wickes v. Belgian American Educational Foundation, Inc., 266 F. Supp. 38, 40 (S.D.N.Y., 1967).

In the instant case, the situation which existed after the entry of the Consent Order did not require the imposition of the drastic remedy utilized by the District Court. There was no showing that once the Consent Order was clarified, there was any threat to the plans' assets nor that any other problem could not be clarified and enjoined if necessary. Plaintiff recognized that the smooth administration of the plans was in the best interest of the beneficiaries and that such administration could best be accomplished by permitting those persons with expertise to continue to function. (Mem. of Secretary of Labor in Support of the Appointment of a Receiver, p. 3).



The possible danger to the beneficiaries after the entry of the Consent Order was minimal; the remedy utilized was the maximum available. The District Judge used a pile driver where only a hammer was needed. His action was a clear abuse of discretion.

One final point in regard to the overbreadth of the Court's remedy should be noted. Neither the Plans themselves nor the beneficiaries of the Plans are defendants in this litigation. While Appellants submit that the Court was without jurisdiction to impose a receiver in the absence of indispensable parties (POINT III, infra), even if this Court finds sufficient jurisdiction, the remedy utilized below must be shaped to parties before the Court. Ward v. Deavers, 203 F. 2d 72 (D.C. Cir. 1953). To limit the impact on non-parties, the remedy utilized below must be restricted to the narrowest injunction and ultimately monetary relief. The absence of necessary parties is, therefore, a further reason to reverse the orders of the District Court.



## POINT II

### THE EVIDENCE ADDUCED BELOW WAS INSUFFICIENT TO WARRANT THE IMPOSITION OF THE DRASTIC REMEDY OF RECEIVERSHIP

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As stated above, a more complete exposition of the facts adduced below is contained in the brief of Defendants-Appellants Calagna et. al, in Docket Number 77-6081. The issues of and arguments contained in the other briefs are specifically adopted and incorporated herein.

However, in addition to the arguments presented in the briefs of the other appellants, there is a specific issue with regard to whether discovery had been impeded to the extent that the drastic remedy of receivership was necessary. Appellants submit that plaintiff's allegations in this regard, which were not discussed in the Memorandum and Order of the District Court, in no way justified the imposition of a receiver.

In his Petition for the Order to Show Cause, the plaintiff alleged that defendants had frustrated discovery and were, therefore, in violation of the Consent Order. Appellants submit that plaintiff's



claim in this regard was without substantial merit in that broad discovery had been previously made available and that, in any event, the minor problems about which plaintiff was complaining did not warrant the drastic remedy of receivership.

By affidavit of Mary S. Calfee, one of the attorneys for plaintiff, it was alleged that defendants had failed to provide access to the books and records of RPI. However, at the hearing regarding plaintiff's claims, Calfee admitted receiving the following documents:

- a) Minutes of organization meeting.
- b) Receipt from Department of State.
- c) Copy of Certificate of Incorporation.
- d) Copy of Corporate By-Laws.
- e) Minutes of first meeting of Board of Directors.
- f) Waiver of notice of first meeting of Board.
- g) Specimen Stock Certificate.
- h) Minutes of first meeting of shareholders.
- i) Waiver of notice of first meeting of shareholders.



- j) Copy of Promissory Note.
- k) Copy of bond obligation from Union to Record Processors.
- l) Copy of communication from Union to Record Processors requesting guaranty authorization.
- m) Copies of promissory notes from the Union to the Community National Bank dated September 18, 1972 and December, 1972 indicating payment July 10, 1975.
- n) Copy of a list of employers under contract with the Union.
- o) Assignment of hypothecation agreement from Local 806 Teamsters Pension Trustees to 806 Record Processors.
- p) Copy of corporate resolution establishing an account at the Community National Bank.
- q) Copy of resolution authorizing corporate guaranty signed by stockholders.
- r) Copy of guaranty and hypothecation agreement from 806 Record Processors, Inc. to the Community National Bank.
- s) Certificate establishing an account at the Manufacturer Hanover Trust Company for 806 Record Processors.
- t) Confession of judgment from Local 806 to 806 Record Processors dated June 24, 1975.
- u) Confession of judgment to 806 Record Processors Inc. from Union dated July 15, 1975.

(A 180 - A 185)



In addition, by affidavits of Joseph Kissane, a Compliance Officer of the Department of Labor, it was stated that access had been given to plaintiff of other documents. These were described as "the financial and certain other records of the Local 806 Teamsters Health and Welfare Fund, the Local 806 Teamsters Pension and Retirement Fund, and 806 Record Processors, Inc." (Kissane affidavit, Petition For An Order To Show Cause ...A 25) Included in these records were the following documents:

- a) 1977 cash receipts and disbursements journals for Local 806 Record Processors, Inc., Local 806 Welfare, Pension and Annuity Funds.
- b) Cancelled checks, bank statements and check books for the above organizations.

(Kissane affidavit, supra)

Furthermore, prior to the consent order, Kissane had examined the following documents:

- a) Records of the Local 806 Teamsters Health and Welfare Fund
  - 1. Cancelled checks and bank statements for the period 10/1/74 to 12/31/76;
  - 2. Cash receipts and disbursements journals for the period 10/1/74 to 12/31/76;



3. General ledgers for the fiscal years ending 9/30/75 and 9/30/76;
4. General journals for the fiscal years ending 9/30/75 and 9/30/76;
5. Minutes of Trustees meetings for meetings from 4/29/59 through 5/4/76;
6. Certain paid bills and other substantiation of disbursements; and
7. Payroll records for the calendar year 1975 and 1976.

b) Records of the Local 806 Teamsters Pension and Retirement Fund

1. Cancelled checks and bank statements for the period 7/1/74 to 12/31/76;
2. Cash receipts and disbursements journals for the period 7/1/74 to 12/31/76;
3. General ledgers for the fiscal years ending 6/30/75 and 6/30/76;
4. General journals for the fiscal year ending 6/30/75 and 6/30/76;
5. Minutes of Trustees meetings for meetings from 4/25/61 through 9/16/76; and
6. Some paid bills and other substantiation of disbursements.



c) Records of 806 Record Processors, Inc.

1. Cancelled checks and bank statements for the period 7/1/75 to 12/31/76;
2. Cash receipts and disbursements journals for the period 7/1/75 to 12/31/76;
3. General ledgers for the fiscal years ending 2/29/76 and 2/28/77 (records incomplete);
4. Some paid bills and other substantiation of disbursements; and
5. Payroll records last two quarters in 1975 and 1976.

d) Records of General Teamsters Industrial Employees Local 806

1. Cancelled checks and bank statements for the calendar years 1975 and 1976;
2. Cash receipts and disbursements journals for the calendar years 1975 and 1976;
3. General ledgers for the calendar years 1975 and 1976 (records incomplete);
4. General journal for the calendar year 1975;
5. Minutes of Executive Board Meetings 2/5/57 through 11/16/76;
6. Minutes of General Membership Meetings 3/12/58 through 9/15/76; and
7. Some paid bills and other substantiation of disbursements.

(Affidavit of Joseph Kissane,  
Motion For Preliminary In-  
junction, Exhibit 1.)



In light of this extensive discovery it is apparent that plaintiff was not having any substantial difficulty with discovery and was simply using non-compliance in this area as a further ruse to gain a revocation of the Consent Order. That plaintiff was engaged in a fishing expedition was adequately demonstrated by the testimony of Mary Calfee at the hearing during which Calfee was unable to specifically document what, if any, information had been withheld. (A 178, A 180)

In any event, if certain internal documents were not produced, not only were they of minor significance in light of the information made available to plaintiff, but argument regarding these documents could be handled as in any other discovery dispute in a civil action. There was absolutely no need for the drastic remedy of receivership either over the plans or over RPI.



### POINT III

#### THE COURT BELOW LACKED JURISDICTION TO APPOINT A RECEIVER IN THE ABSENCE OF THE PLANS AND THE BENEFICIARIES AS PARTIES

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The defendants in this litigation aside from the Union and RPI are the present and former trustees of the Welfare and Pension Plans of Local 806. While the Complaint does not designate that the individual defendants are sued in their capacity as trustees, the description of these individual defendants in the Complaint specifically refers to them as trustees. However, the plans themselves were not sued as entities nor were the beneficiaries either named as defendants or given notice of the proceedings by the plaintiff.

Appellants submit that plaintiff's failure to name the plans and the beneficiaries as defendants prevented the court below from entering an order which so directly affected their rights and interests.



Rule 19(a) of the Federal Rules of Civil Procedure provides that a person who is subject to service of process and whose presence will not deprive the Court of jurisdiction shall be joined as a party if:

(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

In many instances the question of necessary or indispensable parties arises in situations in which joinder of a party would defeat the court's discretion. In those instances the court must decide whether relief may be shaped to the parties before it; or whether the action must be dismissed. See, e.g., Green v. Brophy, 110 F. 2d 536 (D.C. Cir. 1940). In Green the D.C. Circuit reviewed an action by the A.F. of L for the return of funds placed by union members in the custody of the C.I.O.



in trust for the members of an A.F. of L. Union. In upholding the district court's dismissal of the complaint, the court held that the beneficiaries of the trust were indispensable parties to the litigation.

Where...the trustee may not be fairly said to represent the interests of his cestui que trusts, the latter are indispensable parties to litigation involving the trust.

110 F. 2d at 542.

In the instant case, the plaintiff specifically alleges that the trustees have not been representing the interests of the plans' beneficiaries. While Appellants in no way concede these allegations, the posture of the trustees as alleged by plaintiff is in opposition to the beneficiaries who must, therefore, be parties to this lawsuit. Green v. Brophy, supra. See also 3 Bogert, Trusts and Trustees, §522 as cited in Green ("in suits to remove trustees. 'They (beneficiaries) must all be parties to the action in some capacity.'")

In the landmark decision of Mullane v. Central Hanover Tr. Co., 399 U.S. 306 (1949), the Supreme Court held as a matter of due process, that beneficiaries of a fund had to be given notice directly if their addresses were known and by publication if their



addresses were unknown in a case involving judicial settlement of accounts by the trustee. While Mullane does not determine when beneficiaries must be given notice, the opinion recognizes that the beneficiaries might have had actions against the trustee for improper management and that these actions would be foreclosed by the accounting. In the instant case, the beneficiaries may also have actions which might be affected by the instant litigation. Their rights may very well be affected by this suit which itself requires that they be made parties.

In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. Certainly the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process.

Mullane v. Central Hanover Tr. Co.,  
supra, 339 U.S. at 313

Even where the action is to restore a trust corpus rather than settle an accounting, the beneficiaries may have to be joined as parties. Matthies v. Seymour Manufacturing Co., 270 F. 2d 365 (2d Cir. 1949) cert. denied, 261 U.S. 962.



The basic test as to whether the beneficiaries as a group must be joined is whether the adjudication of the rights can be had without "affecting persons not concerned with that right." 3A MOORE'S FED. PRAC., par. 1908. If the adjudication of the rights is not divisible "then all persons concerned with that right...are indispensable to an action for its adjudication." Moore, supra.

The instant litigation seeks to remove trustees, to have new trustees appointed, and to change the manner in which the plans are operated. The beneficiaries clearly have an interest in the adjudication of these matters. They also have a property interest in the corpus of the plans and the manner in which plaintiff seeks to augment it. The beneficiaries are, therefore, necessary parties to this action.

That the statute empowers the Secretary of Labor to act for the beneficiaries is not to say that he can do so in the absence of the beneficiaries as parties. The Secretary has considerations other than the welfare of the beneficiaries and their particular rights in the plans' assets. See, e.g., the purpose clause of the Act, 29 U.S.C. 1001; Green v. Brophy, supra, 110 F. 2d at 544. Thus, the beneficiaries themselves must, at least, be given notice of the institution of this action.



In addition to the beneficiaries, however, the plans themselves have not been named as defendants in this action and appellants submit that the district court lacked jurisdiction to impose a receiver over an entity not a party before it. This jurisdictional problem was apparently recognized in O'Brien v. Cassidy, 76 Cr. 1076 (E.D.N.Y. July 7, 1976) in which a Consent Order was entered appointing a sole trustee to dissolve a pension fund. As part of the order, the plans were made parties defendant pursuant to Rule 19 and were represented by the sole trustee. While the court may have the power to adjudicate the rights of the parties before it in the nature of in personam jurisdiction, the rights of non-parties cannot be so affected. Ward v. Deavers, supra. (See POINT I, supra.) The plans are clearly necessary parties under Rule 19 and since they are within the jurisdiction of the court and will not defeat the court's basic jurisdiction, they must be joined as parties. In their absence the court below was without the power to appoint a receiver and the orders entered below must be reversed.

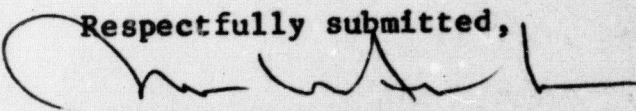


CONCLUSION

For the reasons set forth above, Appellants respectfully urge this Court to reverse the Orders entered below.

Dated: June 17, 1977

Respectfully submitted,



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STATE OF NEW YORK )  
COUNTY OF NEW YORK) ss..

ROBERT LA GRASSA, being duly sworn,  
deposes and says that deponent is not a party to the action,  
is over 18 years of age and resides at 62-20 60th Rd.  
MASPETH, NYC

That on the 17th day of JUNE, 1977,  
deponent personally served the within BRIEF OF APPELLANTS GENERAL TEAMSTERS  
INDUSTRIAL EMPLOYEES LOCAL 806 and 806 RECORD PROCESSORS, INC.  
upon the attorneys designated below who represent the  
indicated parties in this action and at the addresses below  
stated which are those that have been designated by said  
attorneys for that purpose.

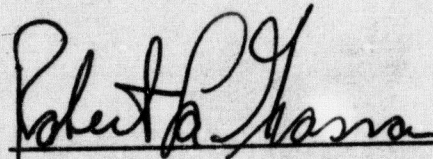
By leaving 2 true copies of same with a duly  
authorized person at their designated office.

~~By depositing 2 true copies of same enclosed~~  
~~in a postpaid properly addressed wrapper, in the post office~~  
~~or official depository under the exclusive care and custody~~  
~~of the United States post office department within the State~~  
~~of New York.~~

Names of attorneys served, together with the names  
of the clients represented and the attorneys' designated  
addresses.

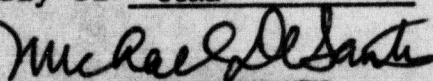
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New York, N. Y. 10007

JITHENDER RAO  
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Room 3555, 1515 Broadway  
New York, N. Y.

  
\_\_\_\_\_

Sworn to before me this

17th day of JUNE, 1977.



MICHAEL DeSANTIS  
Notary Public, State of New York  
No. 03-0930908  
Qualified in Queens County  
Commission Expires March 30, 1979



STATE OF NEW YORK )  
COUNTY OF NEW YORK) ss.:

JAMES LEVERICH, being duly sworn,  
deposes and says that deponent is not a party to the action,  
is over 18 years of age and resides at 185 ST MARK'S PLACE  
STATEN ISLAND, N.Y.

That on the 17th day of JUNE, 1977,  
deponent personally served the within BRIEF OF APPELLANTS GENERAL  
TEAMSTERS INDUSTRIAL EMPLOYEES LOCAL 806 AND 806 RECORD PROCESSORS, INC.  
upon the attorneys designated below who represent the  
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~~of New York.~~

Names of attorneys served, together with the names  
of the clients represented and the attorneys' designated  
addresses.

MURPHY & MAVIGLIA  
Attorneys for Appellants, Snyder  
and Rosenzweig  
250 W. 57th Street  
New York, N. Y. 10019

Sworn to before me this

17th day of JUNE, 1977.

Michael DeSantis

MICHAEL DeSANTIS  
Notary Public, State of New York  
No. 03-0930908  
Qualified in Queens County  
Commission Expires March 30, 1979

James Leverich